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No. 89-1835

In the Supreme Court of the United States

OCTOBER TERM, 1989

KELVIN H. KEITH, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether a consent decree settling a lawsuit under the Age Discrimination in Employment Act, 29 U.S.C. 626 *et seq.*, brought by the Equal Employment Opportunity Commission pursuant to Sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. 216(c) and 217, violated due process because it did not provide relief to an individual within the class of persons aggrieved by the challenged practice who received but failed to respond to a notice requesting that he contact the Equal Employment Opportunity Commission if he was interested in obtaining relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-66) is reported at 897 F.2d 1499. The opinion of the district court (Pet. App. 67-135) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1990. The petition for a writ of certiorari was filed on May 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Employment Opportunity Commission (EEOC) filed this lawsuit on September 15, 1981, under

Sections 16(c) and 17 of the Fair Labor Standards Act (FLSA), 29 U.S.C. 216(c) and 217, alleging that Pan American World Airways, Inc. (Pan Am) violated Section 4(a) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(a), by refusing to permit pilots who wished to work beyond age 60 as flight engineers to do so.[1] In its complaint, the EEOC sought relief for two named individuals and for all other pilots who were forced to retire on or after September 15, 1978, but who would have continued working as flight engineers past age 60 but for Pan Am's policy.

Pan Am provided the EEOC the names of 514 pilots who retired after September 15, 1978, with mailing addresses for 445 of them, including petitioner. Pet. App. 13. In June 1982, the EEOC mailed a letter to all pilots for whom Pan Am had provided an address (including petitioner), advising them of the lawsuit, requesting that they contact the EEOC as soon as possible if they had been affected by Pan Am's policy, and stating that the EEOC would assume they had not been injured by the Pan Am policy if they did not respond. *Id.* at 13-14. Although notice letters were not mailed to the 69 individuals for whom Pan Am had provided no addresses, information regarding the lawsuit was distributed to pilots and former pilots in several other forms. *Id.* at 17-20, 95-96. Based on responses to the notice and other publicity, the EEOC filed a statement with the district court in September 1982, naming 93 retired pilots for whom relief was sought. Petitioner, who retired on June 30, 1981, was not named by the EEOC because he had not responded to the notice. *Id.* at 15. Other claimants were added later as additional pilots contacted the EEOC. *Id.* at 15 n.1.

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[1] Since 1964, the Federal Aviation Administration has prohibited anyone over the age of 60 from serving as a commercial airline pilot. Pet. App. 4.

2. After rejecting two earlier settlement agreements,[2] the district court granted partial summary judgment to the EEOC. The court held that the EEOC established that Pan Am's practices constituted a prima facie violation of the ADEA and that Pan Am would be permitted at trial to offer only the defense that the practices were based on reasonable factors other than age. Pet. App. 70-71. Following two months of trial, the parties arrived at a settlement agreement and proposed consent decree. *Id.* at 71.

The decree provides an award of $17.2 million to be shared by a maximum of 106 named claimants—91 who were named in the fifth amended complaint and 15 who retired after that complaint was filed. The decree also provides that Pan Am will allow pilots to continue working as flight engineers after they reach age 60. Paragraph 17 states that, upon entry of the decree, "this action is hereby dismissed with prejudice as to all persons listed in [the attachments to the decree] and as to any other pilots who would have remained in Pan Am's employment but for Pan Am's refusal prior to February 1, 1988, to employ that person after he reached the age of 60" (emphasis omitted). Pet. App. 25-26.[3]

Nine former pilots who were not eligible for relief under the decree objected to its entry.[4] Eight of them, including

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[2] See *EEOC* v. *Pan American World Airways*, 34 Fair Empl. Prac. Cas. (BNA) 321 (N.D. Cal. 1984); *EEOC* v. *Pan American World Airways, Inc.*, 622 F. Supp. 633 (N.D. Cal. 1985), appeal dismissed, 796 F.2d 314 (9th Cir. 1986), cert. denied, 479 U.S. 1030 (1987).

[3] The parties later executed a side letter providing that any charges that had previously been filed with the EEOC and any ADEA actions arising out of the subject matter of this action would be merged into this lawsuit, and the claimants who instituted those proceedings would share in the benefits provided by the decree. EEOC Supp. C.A. R.E. 220-221. After a search by the EEOC, no such additional claimants were found. Pet. App. 74.

[4] In addition, one named claimant objected to the settlement's silence on the tax status of monetary benefits. Pet. App. 78-83. He did not

petitioner, asserted that, although they retired within the period covered by this lawsuit, they were never notified and given an opportunity to participate in the litigation.[5] Pet. App. 68. Petitioner stated that he did not learn of this lawsuit until the settlement was publicized in February 1988. *Id.* at 88.

After a hearing, the district court approved the consent decree. The court held that, to the extent the decree deprives the objectors of any otherwise viable right under the ADEA,[6] each objector had constitutionally sufficient notice of the lawsuit long before the settlement was reached. Pet. App. 118-127. The court specifically found that, despite his protestations to the contrary, petitioner had received the notice sent by the EEOC at the outset of this litigation. *Id.* at 123-127. Petitioner and one other objector appealed from that ruling. *Id.* at 30.

3. The court of appeals affirmed the district court's decision. The court held that, while a consent decree cannot prejudice the rights of nonparties who fail to consent to it, in this case "the consent decree does not in fact prejudice any rights [petitioner] ha[s] under the ADEA." Pet. App. 45-47. Under the ADEA's enforcement scheme, the court

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appeal the district court's rejection of his suggestion that the decree should be modified on this basis. *Id.* at 83.

[5] The ninth objector, whose claim arose outside the limitations period defined by the EEOC's lawsuit, argued that he should have been included as a claimant. Pet. App. 128-132. The district court rejected his objection (*id.* at 132), and no timely appeal was perfected.

[6] The district court observed that the EEOC's filing of this enforcement action extinguished the rights of aggrieved employees to file individual ADEA claims (Pet. App. 109), that the objectors had no constitutionally protected interest in being included in the EEOC's Section 17 action (Pet. App. 117), and that it was too late for the EEOC to seek relief for them under Section 16(c) because the limitations period had long since run on their claims. Pet. App. 116.

noted, petitioner's right to file a private ADEA action against Pan Am terminated in September 1981 when the EEOC filed suit on his behalf, and the language in the consent decree which purports to bar petitioner and other similarly situated persons from bringing private ADEA suits against Pan Am is, therefore, "mere surplusage." *Id.* at 47-50.

The court also held that the manner in which the EEOC conducted this enforcement action did not violate petitioner's due process rights. Pet. App. 52. The court held that the EEOC's decision to identify the individuals for whom it would seek relief on the basis of responses to the notice it sent did not violate due process. *Id.* at 55. Rejecting the argument that the EEOC's notice was constitutionally inadequate because it did not explicitly state that this lawsuit extinguished petitioner's private suit rights, the court held that the EEOC had no constitutional obligation to inform petitioner of the legal consequences of the filing of this suit. *Id.* at 60. The court expressly refused to overturn the district court's finding that petitioner had received the EEOC's notice and that he had actual knowledge of the lawsuit. *Id.* at 55.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court. Thus, no further review is warranted.

1. The only question properly before this Court is whether the consent decree violates the Due Process Clause of the Fifth Amendment because it did not provide relief to petitioner, an individual who was within the class of persons on whose behalf the EEOC sought relief but who failed to respond to a notice requesting that he contact the EEOC if he was interested in obtaining relief. In light of the district

court's undisturbed finding that petitioner received the EEOC's letter notifying potential claimants of this lawsuit and of their need to contact the EEOC to protect their interests in it (Pet. App. 121-127),[7] it must be concluded that petitioner had notice of the lawsuit and the opportunity to become a member of the class that would be benefitted. Therefore, the petition does not present the question whether the Due Process Clause would have been offended if the EEOC had not included in the settlement individuals who had no notice of the lawsuit and no opportunity to share in the settlement.

Petitioner apparently does not renew his claim that he was not notified of the lawsuit but, instead, argues repeatedly that *other* former pilots did not receive notice. Pet. 35-36, 40, 42-46. Petitioner, however, has no standing to present the claims of others not before this Court. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982) (litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). See also *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Lerner* v. *Casey*, 357 U.S. 468, 473 (1958) (where employee's dismissal resulted from his own lack of responsiveness and failure to pursue administrative remedy, he had no standing to complain of procedural defects in statutory scheme).

2. Petitioner argues that he was denied due process because the consent decree deprives him of statutory rights under the ADEA without his consent. Pet. 19. However, the court of appeals correctly held that the consent decree

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[7] The district court specifically found that petitioner's correct name and address appear on the mailing list provided by Pan Am, and that the EEOC's letter to him was never returned as undeliverable. Pet. App. 88. The court also found that a newsletter describing this litigation, and inviting former pilots to contact the EEOC, was mailed to petitioner at his correct address. *Id.* at 94.

did not prejudice petitioner's rights. Therefore, his lack of consent is irrelevant. As the court held, it was the filing of this action by the EEOC under Section 16(c) and 17 of the FLSA,[8] and not the consent decree, which extinguished petitioner's right to bring a private ADEA action.

As a matter of statutory construction, the court's ruling is unassailable. Private ADEA litigation is authorized under both Section 7(c)(1) and Section 7(b) of the ADEA, which incorporates Section 16(b) of the FLSA. As the court of appeals observed (Pet. App. 37-38), this private enforcement right is expressly limited; it expires upon the commencement of an EEOC enforcement action. See Section 7(c)(1) of the ADEA, 29 U.S.C. 626(c)(1) (the right of any person to bring a private action "*shall terminate* upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter") (emphasis added); Section 16(b) of the FLSA, 29 U.S.C. 216(b) (the right of any employee to bring an action, or to become a party plaintiff in an action, "*shall terminate* upon the filing of a complaint by the [EEOC] in an action under section 217") (emphasis added); see also Section 16(c) of the FLSA, 29 U.S.C. 216(c) (the right to bring a private action "shall terminate upon the filing of a complaint by the [EEOC] in an action under this subsection"). Petitioner does not challenge this plain reading of the statutory language, and every court of appeals that has addressed the question has held that the filing of the EEOC's complaint terminates the right to sue of potential claimants who have not initiated private ADEA actions. See *Dunlop* v. *Pan American World Airways, Inc.*, 672 F.2d 1044, 1049 n.6 (2d Cir. 1982); *Donovan* v. *University of Texas*, 643 F.2d 1201, 1207-1208

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[8] Commission litigation is authorized under Section 7(b) of the ADEA, 29 U.S.C. 626(b), which incorporates Sections 16(c) and 17 of the FLSA, 29 U.S.C. 216(c) and 217.

(5th Cir. 1981); *EEOC* v. *Gilbarco, Inc.*, 615 F.2d 985, 990 (4th Cir. 1980). Accordingly, the court of appeals correctly held that, at the time of the consent decree, petitioner had no right to file suit under the ADEA that could have been prejudiced by the consent decree, since that right had been extinguished years earlier when the EEOC filed suit.

For this reason, petitioner's reliance on *Martin* v. *Wilks*, 109 S. Ct. 2180 (1989), to argue that his rights under the ADEA cannot be extinguished by the consent decree because he was not a party to the EEOC's litigation (Pet. 27-30), is misplaced. In *Wilks*, the Court reiterated the general rule that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." 109 S. Ct. 2184. *Wilks* does not control in this case because, as we discussed above, it was not the consent decree that extinguished petitioner's right to file an ADEA action; it was the commencement of this action by the EEOC.

In *Wilks*, this Court noted that, under some statutory provisions, the filing of an action by one party may extinguish the rights of nonparties to bring a subsequent action without their consent. This Court stated:

> [W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, * * * legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-530 n. 10 [(1984)] ("proof of claim must be presented to the Bankruptcy Court . . . or be lost"); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. [478] (1988) (nonclaim statute terminating unsubmitted claims against the estate).

109 S. Ct. 2184 n.2. Congress adopted such a "special remedial scheme" in the ADEA, terminating the rights of

nonparties to file suit upon the commencement of an enforcement action by the EEOC.[9] As the court of appeals recognized, this limitation on private enforcement was intended by Congress "to relieve the courts and employers of the burden of litigating a multiplicity of suits based on the same violations of the act by an employer." Pet. App. 42 (quoting S. Rep. No. 145, 87th Cong., 1st Sess. 39 (1961)). Therefore, the court of appeals' holding that petitioner's right to file an ADEA action was terminated without his consent when the EEOC filed this action is consistent with this Court's decision in *Martin* v. *Wilks*.

3. The court of appeals also correctly ruled that, assuming petitioner had a protected legal interest in the conduct of the EEOC's action against Pan Am, the procedures followed in this case did not violate his due process rights. Initially, as discussed above, since petitioner received actual notice of the lawsuit and failed to respond, the question of whether it would violate due process to exclude from a lawsuit potential victims of a discriminatory policy who were not notified is not properly before this Court.[10] As to the issue that is properly presented by petitioner, the court of appeals correctly held that the notice sent to petitioner by the EEOC was constitutionally sufficient. Constitutionally sufficient notice need only contain information reasonably necessary under the circumstances to permit an individual

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[9] By contrast, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the statute under which *Wilks* arose, contains no similar provision that terminates private suit rights when the EEOC has filed suit.

[10] Because petitioner received actual notice of the lawsuit, this Court's decision in *Hoffmann-La Roche, Inc.*, v. *Sperling*, 110 S. Ct. 482 (1989), is not relevant to the issue presented here. Moreover, in *Sperling* this Court held that district courts have discretion to authorize notice to potential claimants in a private action under the ADEA. 110 S. Ct. at 486. Nothing in *Sperling requires* notice.

to protect his rights. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950). The EEOC letter informed petitioner that this lawsuit had been filed, provided him an opportunity to contact the EEOC, and explained that the EEOC would assume he had not been injured by the challenged employment practice if he did not respond.

In rejecting petitioner's argument that the notice was deficient because it did not explain that his private right of action had been terminated, the court of appeals correctly held that the EEOC had no constitutional obligation to inform petitioner of the legal consequences of its commencement of this lawsuit. Pet. App. 59-60. As the court explained, the termination of his private right of action occurred under Section 7(c) of the ADEA and Section 16(b) of the FLSA immediately upon the commencement of this action. Pet. App. 59. The bar to petitioner's lawsuit was the result of a self-executing provision of law, much like a statute of limitations. This Court has held that such self-executing bars to litigation do not give rise to a constitutional right to notice of the rule's operation. *Texaco, Inc.* v. *Short*, 454 U.S. 516, 533-538 (1982) (statute of limitations providing for lapse of property right unless owner files statement of claim).

Finally, contrary to petitioner's suggestion (Pet. 27-28), this case does not present the question whether the EEOC can arbitrarily and capriciously exclude from a settlement known claimants whose private rights to sue have been terminated by a governmental enforcement action. In this case, the EEOC relied primarily upon responses of potential claimants who were sent notice of the lawsuit in order to identify which individual victims of discrimination qualified for the relief sought. However, the EEOC also included as claimants other victims of Pan Am's policy who had filed either an administrative charge of discrimination or a lawsuit under the ADEA. Thus, had petitioner taken *any* steps to

present his claim, either by responding to the mailed notice, filing a charge with the EEOC (29 U.S.C. 626(d)), or filing suit within two or three years of his retirement (29 U.S.C. 626(e)(1)), he would have shared in the settlement. He cannot sit on the sidelines until the litigation is terminated favorably, and then upset the settled expectations of the claimants and the defendant by demanding a share of the recovery. See Pet. App. 28-29, 98-99.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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